

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by	)	SPB Case No. 32334
	)	
<b>STEVEN RICHINS</b>	)	<b>BOARD DECISION</b>
	)	(Precedential)
	)	(Modified)
	)	
From official reprimand as an	)	<b>NO. 94-09</b>
Office Assistant (General) with	)	
the Stephen P. Teale Data Center	)	
at Sacramento	)	April 5-6, 1994

Appearances: Fernando Acosta of the California State Employees' Association representing appellant, Steven Richins; Greg Rolen, Deputy Attorney General, representing respondent, Stephen P. Teale Data Center.

Before Carpenter, President; Ward, Bos and Villalobos, Members.

**DECISION**

This case is before the State Personnel Board (SPB or Board) for determination after the Board rejected the Proposed Decision of the Administrative Law Judge (ALJ) in the appeal of Steven J. Richins from an Official Reprimand in the position of Office Assistant at the Stephen P. Teale Data Center (Teale or Respondent). The appellant was reprimanded for inefficiency and willful disobedience based upon allegations that he performed his work poorly, misused the telephone for excessive personal phone calls, read newspapers and books during work time such that it interfered with his job, and was rude to a customer on one occasion.

(Richins continued - Page 2)

The ALJ who heard the case sustained the official reprimand, finding sufficient evidence that appellant used state time for personal pursuits and performed his work in a poor manner. The ALJ rejected appellant's defense that he could not be disciplined for reading on the job and using the telephone for personal calls since other employees were not disciplined for the same conduct.

The Board rejected the Proposed Decision, deciding to hear the case itself. After a review of the entire record, including the transcript, exhibits, and written and oral arguments of the parties, the Board revokes the official reprimand for the reasons that follow.

#### **SUMMARY OF THE FACTS**

Appellant began his career with the State of California in October of 1989 as a "LEAP" candidate.<sup>1</sup> On April 30, 1990, appellant was appointed as an Office Assistant to work in the tape library at Teale. His primary job duties included pulling tapes for Teale's clients, making sure the clients received the proper tapes, and refiling the tapes in the library. At the time of the instant adverse action, appellant had no prior adverse actions.

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<sup>1</sup> A LEAP candidate is a person who enters state service through the Limited Examination and Appointment Program. This program was instituted in 1984 to provide persons with disabilities who might, for reasons related to their disability, not be able to participate in a regular state civil service examination, the opportunity to participate in an alternative examination process to facilitate their employment.

(Richins continued - Page 3)

On January 27, 1992, appellant received a Letter of Warning from Teale. This letter noted appellant's excessive use of the telephone for personal business and cited some specific examples of Teale's general dissatisfaction with appellant's work performance. On February 20, 1992, appellant's supervisors met with him to discuss his continued poor work performance. They also discussed the fact that other employees had complained that appellant was continuing to abuse the telephone for lengthy personal calls and reading personal material while he should have been working. The content of this discussion was documented in a memorandum to appellant dated February 21, 1992.

On May 20, 1992, appellant was issued a second Letter of Warning. This letter detailed instances of deficient performance occurring March 13, March 16, April 14 and May 13, 1992. Appellant was faulted for taking too long to pull tapes, failing to pull tapes for clients, failing to move cartridges from dirty racks to clean racks in a timely manner, and failing to transport tapes from the tape library to the job handling area when asked. The letter reminded appellant not to use the telephone for his personal business. The letter also reminded appellant of the existence of the Employee Assistance Program.

On September 30, 1992, appellant received the instant Official Reprimand which cited Government Code section 19572, subdivisions (c) inefficiency and (o) willful disobedience, as the causes for

(Richins continued - Page 4)

the adverse action. The reasons given for the adverse action were listed in the Notice of Adverse Action as follows: 1) general unsatisfactory performance at work and excessive use of the telephone for personal business as documented in the Letter of Warning dated January 27, 1992; 2) continued use of the telephone for personal business and reading personal material on the job as noted in the February 21, 1992 memorandum; 3) failure to perform job duties efficiently on March 13, March 16 and April 14, 1992 as documented in a second Letter of Warning dated May 20, 1992; and 4) discourtesy to a client on the telephone on September 1, 1992.

At the hearing, Teale introduced the two letters of warning and February 21 memorandum as part of Teale's case-in-chief. Teale also introduced into evidence approximately 10 computer mail messages. These messages were complaints from fellow employees to appellant's supervisor concerning appellant's poor work performance and uncooperative attitude. Most of the computer messages were dated after the issuance of the May 20 Letter of Warning. None of the complainants testified at the hearing. In fact, the only testimony presented at the hearing was that of two of Teale's managers: Jean Hilliard and Mary Skillman.

Without citing specific instances, Ms. Hilliard testified that appellant's work performance was poor, noting the number of complaints she received from staff, and the numerous discussions Teale management had with appellant about his performance. Ms.

(Richins continued - Page 5)

Skillman testified as to the accuracy of the two letters of warning and the February memorandum, documents which she had drafted. She also testified concerning the September 1 telephone complaint from a client.

### **ISSUES<sup>2</sup>**

1. Was the Notice of Adverse Action sufficiently precise so as to apprise appellant of the reasons for the adverse action?

2. What is the effect of the prior Letters of Warning on the adverse action?

### **DISCUSSION**

#### Adequacy of the Notice of Adverse Action

The record in this case reveals that Teale clearly was unhappy with appellant's work performance and that there may well have been sufficient grounds for adverse action. Teale, however, failed to provide adequate notice of the specific charges against appellant in the Notice of Adverse Action.

In the Notice of Adverse Action, Teale alleged in general terms that appellant's work performance was poor and that appellant misused the telephone for personal business and read books and

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<sup>2</sup> When the Board rejected the Proposed Decision, it asked the parties to specifically brief the issue of whether there was sufficient evidence that Teale selectively enforced the rules concerning the use of the telephone for personal calls and reading during worktime so as to provide a defense to the adverse action. After a review of the record, however, the Board determined to revoke the adverse action on other grounds, making it unnecessary to address the defense.

(Richins continued - Page 6)

newspapers while on the job. The notice further stated that appellant's poor work performance was documented in a Letter of Warning dated January 27, a counseling memorandum dated February 21, 1992, and a second Letter of Warning dated May 20, 1992. The only incidents specifically alleged in the Notice of Adverse Action were: 1) incidents of deficient performance occurring on March 13 and 16 and April 14, all of which were the impetus for the second Letter of Warning; and 2) one instance of discourtesy to a client on September 21, 1992.

As set forth in SPB Precedential Decision Leah Korman (1991) SPB Dec. No. 91-04, p. 4: "The right to be notified of the charges is a critical element in due process of law." In Korman, the Notice of Adverse Action at issue stated only that there were certain instances when Korman's performance or behavior was unacceptable, but did not state specifically what those instances were. The Board adopted the ALJ's Proposed Decision which revoked the adverse action against Korman, finding that the Department failed to fulfill its requirement to give reasonable notice of the charges. The decision noted that since Korman was not told what acts were being punished, she was hampered in her ability to prepare a defense.

The general allegations in the instant Notice of Adverse Action pertaining to appellant's excessive use of the telephone for personal business, reading of personal material, and resulting

(Richins continued - Page 7)

unsatisfactory job performance, are similarly not sufficiently specific to enable appellant to prepare a defense to the charges.

Other than references to the incidents of March 13 and 16, April 14 and September 1 (which will be discussed below), the Notice of Adverse Action contains no dates, times or other details concerning appellant's excessive use of the telephone and resulting poor work performance. It is incumbent upon departments, if they intend to take adverse action, to document any specific instances of misconduct, note those specific instances in the Notice of Adverse Action, and present supporting evidence of those instances at the hearing. Teale cannot make a case against appellant without setting forth in the Notice of Adverse Action specific instances or details which form the basis for the adverse action and proving the underlying facts by competent evidence.<sup>3</sup>

In the instant case, we note that Teale introduced into evidence electronic mail messages revealing complaints of Teale employees to appellant's supervisor which concerned appellant's poor work performance after the second letter of warning had issued in May of 1992. If Teale intended to discipline appellant based upon these continuing instances of poor performance, it should have

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<sup>3</sup> It should be noted that appellant's supervisor admitted there was no way to know whether appellant's telephone conversations were business or personal. The record revealed that appellant did need to use the telephone in his job duties on occasion. Details such as dates and times of incidents were necessary to provide adequate notice to the appellant of the charges against him.

(Richins continued - Page 8)

listed these incidents in its Notice of Adverse Action and introduced into evidence testimony from the complainants themselves, not just the computer messages which were uncorroborated hearsay. Without specific references in the Notice of Adverse Action and supporting evidence at the hearing, the adverse action cannot stand based upon general allegations of poor performance, excessive use of the telephone, and reading on the job.

#### The Effect of the Letter of Warning

The only incidents of poor work performance specifically alleged in the Notice of Adverse Action, other than the September 1 incident, are those incidents which were previously the subject of a letter of warning to the appellant on May 20, 1992. In the case of Gary Blakeley (1993) SPB Dec. No. 93-20, the Board was faced with the issue of whether an employee could be charged in an adverse action for incidents which were previously the subject of a letter of warning. The Board concluded that the employee could not, stating in a precedential decision:

Incidents that form the basis for informal discipline imposed on the employee, cannot then be used as the basis for formal adverse action, except for the limited purpose of showing that the employee has been warned or progressively disciplined with respect to a prior misconduct. Gary Blakeley (1993) SPB Dec. No. 93-20, p. 6.

The scope and breadth of the Board's decision in Blakeley has been argued by the parties before the Board's administrative law

(Richins continued - Page 9)

judges with various results. The holding of Blakeley is simply that an employee who has already been subject to discipline could not again be disciplined for charges arising out of the same facts. While the Board stands by its policy that a department should not discipline employees twice for the same incidents of poor performance or misconduct, attempts by the administrative law judges to answer the difficult question of what measures taken by the departments are disciplinary in nature have yielded conflicting results.

Since various departments, and even divisions within the same department, utilize a myriad of methods to document employee misconduct or poor performance, the Board's task of providing guidance as to what constitutes "discipline" is especially difficult. We decline to rely upon the name of a particular document issued to an employee as determinative of the question. Instead, the question of whether an employee is being disciplined twice for the same misconduct will be decided on a case-by-case basis. The former actions of the employer with respect to a particular incident or course of misconduct will be evaluated to determine whether the actions taken were truly disciplinary in nature and effect. Whether a memorandum of understanding between the parties, a regulation, or written departmental policy recognizes the action as disciplinary will be strong evidence as to the intent behind the department's action. In the absence of such

(Richins continued - Page 10)

evidence, whether or not a department's former actions will bar formal adverse action based upon the same incidents will depend upon whether the employer has somehow communicated to the employee that the action being taken was intended to resolve with finality the matter and that only future occurrences would form the basis for more severe action.

Blakeley was never intended to preclude an employer from taking formal adverse action after merely documenting employee misconduct or from counselling or instructing employees as to the need for improvement. To the extent Blakeley can be construed as precluding such management actions, it is hereby expressly disapproved.

In the present case, the May 20 Letter of Warning, which cited incidents of poor performance of March 13, 16 and April 14 stated:

Steven all of these actions will not be tolerated and any further problems will result in a more severe action (sic) taken such as, formal letter of reprimand, demotion or dismissal. (emphasis added).

Thus, on its face, the Letter of Warning implies that it is itself an action, disciplinary in nature; that no action will be taken based on the incidents noted in the letter; and that only further incidents will result in formal discipline. By issuing a formal adverse action based upon the same incidents which were the subject of the warning letter, Teale attempted to discipline

(Richins continued - Page 11)

Richins twice for the same occurrences, first informally and later formally.

Instead, after the issuance of the Letter of Warning, Teale should have tracked all post-warning performance deficiencies, such as those that were the subject of the computer mail messages admitted into evidence, and listed those performance deficiencies as the basis for the instant adverse action. Teale would have then been justified in noting the prior informal disciplinary efforts, both in the Notice of Adverse Action and in its case-in-chief, to show that appellant had been previously warned about his performance, but the warnings did not curb his behavior. Teale failed to do this, however, and thus we cannot sustain an adverse action based only upon the incidents which were previously the basis for a letter of warning.

#### Failure to Charge the Proper Cause for Discipline

The remaining September 1 incident specifically alleged in the Notice of Adverse Action cannot form the basis for adverse action either. The September 1 incident involves an allegation that appellant was rude to a Teale customer on the telephone. The only charges listed against appellant in the Notice of Adverse Action are inefficiency and willful disobedience. Discourtesy of the public and other employees [Government Code section, subdivision (m)] was not charged as a cause for adverse action. The Board cannot sustain discipline for conduct where the proper cause for

(Richins continued - Page 12)

discipline is not alleged in the Notice of Adverse Action. Robert Boobar (1993) SPB Dec. No. 93-21, p. 8. (See also, Negrete v. State Personnel Board (1989) 213 Cal.App.3d 1160.) Since we find that the allegation of appellant's rude phone manners constitutes neither inefficiency nor willful disobedience, we find that appellant cannot be disciplined for this incident.

#### **CONCLUSION**

The Board certainly does not condone an employee's poor performance on the job. The result herein is dictated by the legal requirement that employees receive full due process of the law: employee misconduct must be specifically charged and sufficiently proven for an adverse action to be sustained. In the instant case, after the second letter of warning was issued to appellant on May 20, 1992, Teale could have tracked all instances of further poor performance and listed those instances in the Notice of Adverse Action with the appropriate corresponding charge under Government Code section 19572. Then, at the hearing, testimony could have been introduced to support those incidents as alleged in the notice. Teale failed to do so, however, and under the circumstances, we have no choice but to revoke the official reprimand.

**ORDER**

Upon the foregoing findings of fact and conclusions of law and the entire record in this case, and pursuant to Government Code sections 19582, it is hereby ORDERED that:

1. The adverse action of an official reprimand is hereby revoked.

2. This decision is certified for publication as a Precedential Decision pursuant to Government Code section 19582.5.

STATE PERSONNEL BOARD\*

Richard Carpenter, President  
Lorrie Ward, Member  
Floss Bos, Member  
Alfred R. Villalobos, Member

\* Alice Stoner, Vice President did not participate in this decision

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision and Order at its meeting on March 8, 1994 and modified on April 5-6, 1994.

GLORIA HARMON  
Gloria Harmon, Executive Officer  
State Personnel Board